Petition

81-1165

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID LEADER and NORMAN LEADER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether defendants received that fair trial to which they are constitutionally entitled under the combined circumstances posed by the following included questions:

(A) Whether defendants received a fair trial on the substantive charges of which they stand convicted, where the jury was permitted to hear considerable prejudicial evidence pertinent only to a later-dismissed conspiracy count;

(B) Under Federal Rule of Evidence 609;

(i) Whether the trial court erroneously permitted the jury to consider one defendant's 10-year-old State misdemeanor theft conviction, absent circumstances warranting a finding that such prior offense "involved dishonesty" under Rule 609 (a)(2);

(ii) Whether such conviction was improperly received over the objection that it was invalidly obtained due to ineffective assistance of counsel on account of improper joint representation in violation of the Sixth Amendment;

(C) Whether defendants were deprived of a fair trial by the submission to the jury of improper verdict forms as to three of the counts, which did not provide the alternative of "not guilty" as to those counts.

2. In this circumstantial case—wherein the reviewing court has conceded that various errors did occur which it has deemed "harmless"—whether defendants' convictions may stand, consistently with due process of law (as set out in *Sandstrom* v. *Montana*, 442 U.S. 510, and in accordance with principles of such cases as *Leary* v. *United States*, 395

U.S. 6) where the jury was instructed over defense objection that, "No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate," whereby the jury was permitted to find the essential element of guilty knowledge on the basis of mere negligence through the use of a constitutionally impermissible inference or presumption which effectively shifts the burden of proof away from the prosecution and violates defendants' presumption of innocence.

3. In the face of all the claims of error above (Questions 1 & 2), can it fairly be said that the due process evidentiary standard of *Jackson* v. *Virginia*, 443 U.S. 307, has here been met, since the jury may well have relied on inadmissible evidence in reaching its conclusion of guilt?

Parties Involved*

Petitioners, David Leader and Norman Leader, were the defendants in the District Court for the Northern District of Illinois, Eastern Division, and appellants in the Court of Appeals for the Seventh Circuit. [A co-defendant, Michael C. Modrich, who was tried with defendants, was found guilty by the jury, but the court entered judgment of acquittal as to him. The government appealed, No. 80-1914, in which case Modrich was the appellee and the government was the appellant. See App. B. Another co-defendant, Buddy Scott, charged with the conspiracy count only, was directed out by the court at the close of the government's case when the court directed acquittal as to all defendants on the conspiracy count. Respondent, the United States of America, was the prosecution (plaintiff) in the trial court.] In defendants' appeal, respondent was the appellee [in Modrich's case, respondent was the appellant] in the Court of Appeals.

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* Per Rule 21.1(b).

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1. The decision below fosters disrespect for the constitutionally guaranteed right to a fair trial by affirming on a theory of "harmless error" despite the following seriously prejudicial errors at defendants' trial:

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(A) The jury which convicted defendants of substantive offenses was improperly permitted to hear considerable prejudicial evidence pertinent only to a later-dismissed conspiracy count;

(B) Under Federal Rule of Evidence 609:

(i) The trial court erroneously permitted the jury to consider one defendant's 10-year-old State misdemeanor theft conviction, absent circumstances warranting a finding that such prior offense "involved dishonesty" under Rule 609(a)(2);

(ii) Such conviction was improperly received over the objection that it was invalidly obtained due to ineffective assistance of counsel on account of improper joint representation in violation of the Sixth Amendment;

(C) Improper verdict forms were submitted as to three of the counts, which did not provide the alternative of "not guilty" as to those counts.

Certiorari should be allowed so that this Court may resolve these serious procedural questions affecting the substantial constitutional rights of defendants within the federal criminal justice system 14

2. The decision below condones violation of defendants' due process rights, contrary to the requirements of *Sandstrom* v. *Montana*, 442 U.S. 510, and at odds with principles of such cases as *Leary* v. *United States*, 395 U.S. 6 where the jury was instructed over defense objection that, "No person can intentionally avoid knowledge by clos-

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ing his eyes to facts which should prompt him to investigate," whereby the jury was permitted to find the essential element of guilty knowledge through the use of a constitutionally impermissible inference or presumption which effectively shifts the burden of proof away from the prosecution and violates the defendants' presumption of innocence. Certiorari should be allowed to eliminate the widespread use of this dangerous instruction 23

3. The decision below seriously erodes the due process standards relative to the government's burden to prove every element of the offense beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358, by affirming upon evidence which—minus the evidence inadmissible per Questions 1(A) & 1(B), and but for the prejudicial procedural errors in the verdict forms and instructions per Questions 1(C) & 2—is legally insufficient as a matter of law to establish the essential element of guilty knowledge. Certiorari should be allowed to clarify the applicability of *Jackson* v. *Virginia*, 443 U.S. 307, to federal convictions, and so this Court may specify that the *Jackson* due process evidentiary standard requires consideration of only the legally competent, admissible evidence 27

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In the
Supreme Court of the United States

October Term, 1981

No.

DAVID LEADER and NORMAN LEADER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, David Leader and Norman Leader (brothers; hereafter, David and Norman, or defendants) respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming their convictions.

Judgment and Order Below

The Order of the Court of Appeals for the Seventh Circuit, No. 80-1825, unpublished per Circuit Rule 35, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On November 9, 1981, the Court of Appeals for the Seventh Circuit entered its Order affirming defendants' convictions. (App. A) No petition for rehearing was filed. This petition to review the judgment in a criminal case of a federal court of appeals is timely filed within 60 days

after entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 20.1 of this Court.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be . . . deprived of . . . liberty . . . without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .; . . . and to have the Assistance of Counsel for his defence."

Title 18, United States Code, sec. 1341 provides:

> "§ 1341. *Frauds and swindles*
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 18, United States Code, sec. 2314 provides:

> "§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting*
>
> Whoever transports in interstate . . . commerce any . . . securities . . . , of the value of $5,000 or more,

knowing the same to have been stolen, converted or taken by fraud; or * * *

Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities . . . , knowing the same to have been falsely made, forged, altered, or counterfeited; or

* * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * * "

F.R.Cr.P. 8(a) provides:

"Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

F.R.Cr.P. 8(b) provides:

"Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

F.R.Cr.P. 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

F.R.E. 609(a) provides, in pertinent part:

> "(a) General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment."

STATEMENT OF THE CASE

Nature of the Case

Defendants, David Leader and Norman Leader, originally were charged in Indictment 79 CR 180, which charged defendants and co-defendants, Michael Modrich, Mark J. Minervino and Buddy Scott, in Count 1 with conspiracy in violation of 18 U.S.C. 371; Count 2 charged David Leader with transporting forged securities in interstate commerce in violation of 18 U.S.C. 2314; Count 3, Mark J. Minervino with making false statements in violation of 18 U.S.C. 1623; Count 4, Buddy Scott with making false statements in violation of 18 U.S.C. 1623; Count 5, Buddy Scott with violation of 18 U.S.C. 1623; Counts 6 through 15 charged defendants Norman and David Leader with mail fraud in violation of 18 U.S.C. 1341, in causing checks to be delivered as part of a mail fraud scheme. Defendants proceeded to trial with co-defendants Scott and Modrich. All defendants on trial were found guilty.

The trial court granted a new trial.

The government then reindicted and retried the defendants; Count 1 charged Michael C. Modrich, David and Norman Leader, Mark Minervino and Buddy Scott with conspiracy in violation of 18 U.S.C. 371; Counts 2, 3 and 4 charged David Leader, Norman Leader and Michael Modrich with causing certain stolen or fraudulently obtained securities to be transported in interstate commerce in violation of 18 U.S.C. 2314; and Counts 5 through 14

charged David and Norman Leader with violation of 18 U.S.C. 1341 in that they caused certain checks to be delivered through the mails as part of a fraud.

The trial court directed a finding of not guilty on the conspiracy charge as to all defendants. Defendant Modrich was found guilty by the jury; however, the trial court entered a judgment of acquittal. On appeal by the government, the Seventh Circuit affirmed. (App. B)

Defendants David and Norman Leader were convicted on Counts 2 through 14. On Counts 2 through 13, each defendant was sentenced to a period of 5 years and a $10,000.00 fine, said sentences to be concurrent, and on Count 14 a sentence to probation for a period of 5 years, said 5 year period of probation to run consecutive to the concurrent sentences on the other counts. On appeal, the Seventh Circuit affirmed. (App. A)

Jurisdiction of Trial Court

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendants here were charged with having committed offenses against the laws of the United States, to wit, 18 U.S.C. secs. 371, 1341 & 2314.

Statement of Facts

The facts of the case generally are set out in the reviewing court's order, (App. A, pp. App. 3-10), and are not repeated here to avoid unnecessary duplication. Specific facts relative to the Questions Presented are:

Facts re dismissed conspiracy charge

Defendants' motion for a severance from the other defendants was denied. (App. A, p. App. 11) After the trial court granted judgment of acquittal as to all defendants

on the conspiracy count (Count 1), defendants moved for mistrial on all the remaining counts. (Tr. 982)

The government presented evidence in an attempt to prove a conspiracy involving the defendant Scott who was charged *only* in the conspiracy Count 1. The testimony suggested the defendants' connection with a sleazy person, Thomas J. Keenan, an apparent hood who had been convicted of forging money orders (Tr. 313), who was working as a bodyguard and studying for the "ministry" (Tr. 313), who had been a partner with Mr. Scott in a night club operation (Tr. 315), and who, with his half-brother, allegedly was involved in a scheme to dispose of anywhere from $20 million to $100 million of stolen securities. (Tr. 341-42) Keenan's testimony was corroborated by the testimony of Agent Pizer,[1] read to the jury from the prior trial.[2]

Defense counsel's strategy necessarily was influenced by the original existence of the joined conspiracy count, and the following actions by counsel were a direct result of this: Counsel's cross-examination of Keenan (Tr. 371 et seq.), which communicated the defense's concern with this testimony to the jury, to defendants' prejudice; and counsel's opening statement, designed to explain evidence of alleged co-conspirators' declarations, the admission of which was anticipated with respect to the conspiracy charge, focused the jury's attention on these declarations which, as it eventually turned out, were held inadmissible (contrary to the judge's ruling as to their admissibility in the first trial). (Tr. 40-44; see Tr. 964-65)

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[1] Pizer's testimony from the previous trial was read because he was sick and unable to testify.

[2] Pizer had testified that discussion involved handling $100 million in stolen securities. (Tr. 777)

Facts re State misdemeanor theft conviction

Before he testified, Norman Leader moved *in limine* to preclude the government from presenting evidence that he was convicted of a State misdemeanor theft offense almost 10 years before on grounds there was not sufficient evidence that it involved "dishonesty" so as to be admissible under F.R.E. 609(a)(2), and because the prior conviction was constitutionally invalid, having resulted from a proceeding in which defendant did not have effective assistance of counsel due to a conflict of interest. After reviewing the transcript of the State trial (hereafter, S.Tr.), the trial court denied the motion, (Tr. 992), allowing the prosecution to use the conviction as impeachment of Norman. (Tr. 1071) (See App. A, p. App. 12)

(i) *Whether offense "involves dishonesty"*

The transcript in the State proceedings reflected that the prior conviction was based on possession of five leather jackets, knowing them to have been stolen. (S.Tr. 46; App. A, p. App. 12) The State trial court found Norman guilty on the basis of a possibility of knowledge that the goods were stolen, on a "knew or should have known" mental state as to the character of the goods. (S.Tr. 43)

(ii) *Ineffective assistance of counsel*

As to ineffective representation of counsel due to conflict of interest, Norman demonstrated from the State proceedings that, because the circumstances were such that only one of the two co-defendants could be found guilty,[3] joint counsel for both of them could not properly represent them both, since proper representation of either in-

[3] Even the State prosecutor agreed that only the person seen opening and closing the car trunk could be guilty. (Tr. 844)

volved attempting to implicate the other. An eye-witness, arresting officer Thomas Keane, vacillated as to which defendant opened and closed the car trunk, (S.Tr. 27); yet, because of his joint representation, counsel did not cross-examine the other defendant in an effort to exonerate Norman.

Facts re improper verdict forms

The jury was not provided with any verdict forms whereby they could find defendants David and Norman Leader not guilty as to Counts 2, 3 and 4. The reviewing court agreed that the verdict forms were incorrect and improper in this respect. (App. A, p. App. 14)

Co-defendant Modrich (see App. B) was also charged with defendants in Counts 2, 3 and 4; the verdict forms as to him on those counts *did* provide for "not guilty" findings.

Facts re prejudicial instruction on knowledge

Guilty knowledge is an element of the offenses of which defendants stand convicted. (See statutes, 18 U.S.C. 1341 § 2314, set out at pp. 2-3, *supra.*)

Over defense objection, the court instructed the jury that:

> "No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate." (Tr. 1342)

Facts re insufficiency of competent evidence

In addition to the facts set out in the reviewing court's order, (App. A, pp. App. 3-10), details relevant to this issue are contained within the argument section, pp. 28-29, *infra.*

REASONS FOR GRANTING THE WRIT

Prefatory Statement

In its Unpublished Order,[4] the Court of Appeals for the Seventh Circuit echoes a litany which has become all too common in our criminal justice system: that because, in its omnipotent perception,[5] defendants are guilty, it doesn't

[4] The Court of Appeal's Order is "unpublished" and "not to be cited" per Seventh Circuit Rule 35. While this practice of deciding non-frivolous appeals via decisions seen only by the parties may be necessitated by the increasing volume of appeals, it cannot help but result in a distorted (false?) picture of the decisions coming out of the various reviewing courts; for by choosing to deem a decision "unpublished" and "not to be reported" per a rule such as this, the reviewing courts effectively control what rulings are accessible to the public (and to the legal profession) amongst the many cases actually decided. For practical purposes, such unreported decisions are forever buried in the legal literature.

[5] Reversing for an error involving re-charging a jury, the Fifth Circuit declined to conclude the error was harmless, using the following colorful language as to the real impossibility of so determining:

> "Despite suggestions from some quarters to the contrary, such determinations [that error was harmless] are beyond our powers to make.[1]

> [1] "We all know that just being a lawyer doesn't make a man a magician or give him supernatural powers. Only an appointment to the federal judiciary can do that.' Dewitt Hale, then chairman, Judiciary Committee, Texas House of Representatives."

United States v. *De La Torre*, 605 F.2d 154, 156 & 156 n. (5 Cir. 1979).

matter what happened at the trial.[6]

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[6] The oft-quoted words of Mr. Justice Frankfurter, speaking for the Court in *Bollenbach* v. *United States*, 326 U.S. 607, 90 L.Ed. 350 (1946), are rarely as relevant as here, on the facts. In *Bollenbach*, the defendant was convicted for offenses involving the transportation of stolen securities across state lines; the securities had been stolen in Minneapolis and Bollenbach helped to dispose of them in New York. Reversing because the judge's instruction allowed the jury to presume guilty knowledge—that the possesser was the thief and transported the property in interstate commerce—from the fact of recent possession in another State, the Court refused to "close its eyes" to the probable prejudicial impact of the instruction upon the jury:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that *the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.*
>
> "Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. . . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial', the judicial pendulum need not swing to presuming errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty." *Id.* at 614-15, 90 L.Ed. at 355-56. (Emphasis added.)

We respectfully suggest that to enforce the following sentiment in this case wherein "harmless error" amounts to empty rhetoric, certiorari should be allowed:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.
>
> "Judgment reversed." *Id.* at 615, 90 L.Ed at 356.

Amen.

This case presents interesting and important issues concerning serious procedural questions which perplexingly occur on a frequent basis in the trial of criminal cases, namely, (i) what should a trial court do when the conspiracy count which was the sole basis justifying joinder has been dismissed,[7] and (ii) respecting admissibility of prior convictions under F.R.E. 609: (a) what standard applies in determining whether a prior misdemeanor conviction "involved dishonesty" so as to be admissible under Rule 609(a)(2), and (b) whether a prior conviction invalid because of the ineffective assistance of counsel [due to improper joint representation] may be used against defendant.[8]

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[7] Here, the situation was aggravated to defendants' prejudice, for not only was the conspiracy count unfounded in evidence—(the trial court granted defendants' motion for acquittal on the conspiracy count at the close of the government's evidence)—but further, a co-defendant, one, Modrich, who had also been found guilty (along with defendants) by the jury, was acquitted by the trial court in a decision affirmed by the Seventh Circuit on appeal by the government. (See App. B, *infra.*)

[8] While this Court has ruled that a conviction obtained without any counsel at all cannot be used against a defendant, see *Burgett* v. *Texas*, 389 U.S. 109, 19 L.Ed.2d 319 (1967), apparently Your Honors have not yet spoken to whether the principles underlying this prohibition apply equally to a conviction obtained with "ineffective assistance" of counsel due to improper joint representation as in *Cuyler* v. *Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333 (1980).

And, with specific reference to Rule 609(a)(2), this case presents a uniquely appropriate opportunity for this Court to assist those courts which must apply the Rule by discussing the standards and proper practice for administering the Rule with respect to whether a prior misdemeanor conviction sufficiently involved "dishonesty" to render it admissible for impeachment purposes.

More unusual is the issue concerning the concededly improper verdict forms submitted to the jury,[9] and we ask Your Honors to address the question whether defendants could possibly get a "fair trial" where the jury was given no option to find them "not guilty" on three of the 13 counts.[10]

As to each of the above contentions, the Court of Appeals finds that, even if there was error, it was "harmless" or "not prejudicial" due to the evidence against defendants.[11]

A reasonable hypothesis of innocence was readily available from the evidence presented;[12] but we ask whether

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[9] Perhaps the paucity of recent cases on this subject is explicable in that the error (failing to give the jury verdict forms which require them to render a separate guilty/not guilty verdict as to each defendant as to each count) is so blatant and patent that nowadays it hardly ever arises. But now that it has arisen, this Court should address itself to the issue whether the prejudice may be disregarded because of the alleged sufficiency of the evidence in the eyes of the reviewing court.

[10] Again, this prejudice was magnified because the jury *did* receive separate verdict forms as to the co-defendant, Modrich, but not as to defendants.

[11] See App. A, pp. 11-12, 13-14, 15.

[12] See Reason 5, *infra*. We submit the evidence admitted under the guise of the later-dismissed conspiracy count (see pp. 5-6) and the improper evidence of defendant Norman Leader's prior misdemeanor conviction so clouded the jury's consideration of the entire tapestry of the evidence that it is impossible for any reviewing court to conclude that the error(s) did not affect the result. Absent this evidence—and absent the improperly coercive verdict forms and the instruction complained of, permitting an inference of guilty knowledge from mere negligence—we submit the due process standard of *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), dictates that these convictions be overturned.

any reasonable juror could have eliminated the prejudicial content of the various errors from his/her thought processes so as to be able to perceive such hypothesis of innocence.

Last—but far from least—the reviewing court has approved instructing the jury that "no person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate." In this circumstantial case, this was the "last straw." Defendants' presumption of innocence and the government's due process burden of proving every element of the offenses charged beyond a reasonable doubt are swept under the rug of the glib conclusion, unfounded in law or logic, that this instruction "does not involve any presumption nor any shift of the burden of proof."[13]

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[13] App. A, p. App. 11. The instruction complained of violates principles established in *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39 (1979).

This is the only allegation of error which the Seventh Circuit does not treat as "harmless error." Rather, the Judges have [to pare a phrase] "closed their eyes" to the realities of the instruction complained of, "refusing to investigate" the natural probabilities and possibilities leading to the inexorable conclusion that the jurors might have treated the instruction as permitting (if not requiring) a conclusion of guilt from a state of facts equivalent merely to negligence. Under *Sandstrom*, the *possibility* that an improper inference may be drawn requires reversal; for Your Honors held that, in determining whether a complained-of instruction deprived a defendant of his constitutional rights,

> "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could have* interpreted the instruction." *Id.* at 514, 61 L.Ed.2d at 45. (Emphasis added.)

1.

The decision below fosters disrespect for the constitutionally guaranteed right to a fair trial by affirming on a theory of "harmless error" despite the following seriously prejudicial errors at defendants' trial:

(A) The jury which convicted defendants of substantive offenses was improperly permitted to hear considerable prejudicial evidence pertinent only to a later-dismissed conspiracy count;

(B) Under Federal Rule of Evidence 609:

(i) The trial court erroneously permitted the jury to consider defendant's 10-year-old State misdemeanor theft conviction, absent circumstances warranting a finding that such prior offense "involved dishonesty" under Rule 609 (a)(2);

(ii) Such conviction was improperly received over the objection that it was invalidly obtained due to ineffective assistance of counsel on account of improper joint representation in violation of the Sixth Amendment;

(C) Improper verdict forms were submitted as to three of the counts, which did not provide the alternative of "not guilty" as to those counts.

Certiorari should be allowed so that this Court may resolve these serious procedural questions affecting the substantial constitutional rights of defendants within the federal criminal justice system.

Introduction

Defendants' defense was that they lacked guilty knowledge, an essential element of the offenses. There was con-

siderable evidence that their dealings with a person they believed to be Mr. Peters, owner of the stocks, were so open and "above board" as to negate a finding of knowledge.[14] (See pp. 28-29, *infra*.)

However, the jury was exposed to prejudicial evidence tailor-made to persuade them that, because of defendant's unsavory associates and considering that Norman had already been convicted (albeit some 10 years previously) of theft, defendants probably had the requisite guilty knowledge.[15]

Similarly, the court's failure to provide the jury with forms of verdict to find defendants "not guilty" as to counts 2, 3 and 4 amounted to a directed verdict of guilty as to those counts, communicating to the jury that there was no possibility of finding them not guilty on those counts.

In determining that these irregularities, even if error, were not so prejudicial as to require reversal, the Seventh Circuit has misapplied the harmless error rule, determining that the evidence against defendants was so strong as to preclude the possibility that the jury was influenced by the errors. Considering the defense theory, supported by substantial credible evidence, the court was wrong to conclude these errors were not prejudicial; for the very thrust

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[14] *E.g.*, dealing with a man they believed to be Peters in an open fashion at currency exchanges where defendants were known (Tr. 472-99; 622-32); depositing checks in accounts clearly connected with defendants or negotiating them in normal business dealings. (Tr. 467-69; 622-32)

[15] The instruction complained of as to knowledge, see Reason 2, *infra*, served the same purpose as the prejudicial evidence here attacked—that is, to render it virtually impossible for the jury to give any credence whatsoever to the defense theory and the defense evidence.

of the prejudicial evidence, in short, is, "once a thief, always a thief," and "one who associates with people who deal in millions of dollars in stolen stocks is probably guilty as well."

In light of the actual errors here, and considering the defense and the evidence, it cannot be said beyond a reasonable doubt that the error(s) did not affect the result, per the standards this Court has laid down for deciding whether or not a given error requires reversal. *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705 (1967).

Moreover, the reviewing court has failed to consider the combined contextual effect of the multiple errors here complained of, as required by such decisions as *Kotteakos* v. *United States*, 328 U.S. 750, 761-65, 90 L.Ed. 1557, 1564-1567 (1946), and *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 242, 84 L.Ed. 1129, 1176, 1178 (1940); *accord*, *Baines* v. *United States*, 426 F.2d 833, 835 (5 Cir. 1970); *Getchell* v. *United States*, 282 F.2d 681, 691 (5 Cir. 1960). Rather, the court has treated each issue as if in a vacuum.

Specific Prejudice

(A) *Dismissal of conspiracy count.*

The pertinent factual material is set out at p. 6, *supra*. Basically, the evidentiary details to which the jury was exposed due to the improper joinder of the counts and defendants purport to link defendants to some extremely unsavory characters, with whom the Leaders were shown to have not even any colorable connection, and who supposedly were dealing in stolen stocks of immense value ($20 million to $100 milion). (Tr. 313, 341-42) Before the court ordered the conspiracy count dismissed at the second trial, (see Tr. 964-65), defense counsel was obliged to cross-examine as to this evidence, and also referred to damaging

declarations by alleged co-conspirators which later were held inadmissible. (Tr. 40-44) These tactics, which were necessary to defend against the conspiracy charge, backfired after count 1 was dismissed.

After the conspiracy count was dismissed, the court should have granted defendants' motion for mistrial as to the remaining, substantive counts, for the jury had already been exposed to material pertaining only to the non-proven conspiracy which could not help but operate to defendants' prejudice.

Although dismissal of a conspiracy count does not require the grant of a mistrial upon the remaining counts where no prejudice is shown, *Schaffer* v. *United States*, 362 U.S. 511, 4 L.Ed.2d 921 (1960), where, as here, the conspiracy count furnished the nexus for joinder, and there is demonstrable prejudice, the convictions on the substantive counts should be reversed. See *United States* v. *Blanker*, 395 F.2d 881 (2 Cir. 1968); *United States* v. *Bertolotti*, 529 F.2d 149 (2 Cir. 1975); *United States* v. *Buller*, 494 F.2d 1246 (10 Cir. 1974). *Cf. United States* v. *Nettles*, 570 F.2d 547 (5 Cir. 1978); *United States* v. *Gentile*, 495 F.2d 626, 631-32 (5 Cir. 1974).

The demonstrable prejudice comes from the jury's exposure to inadmissible evidence of an associate's separate offenses, the harmful effects of which may not be obviated even by limiting instructions, *cf. United States* v. *Boyd*, 595 F.2d 120 (3 Cir. 1978); from spillover of evidence pertaining to the unsubstantiated conspiracy count so as to influence the jury's deliberations on the remaining counts, see *United States* v. *Johnson*, 515 F.2d 730 (7 Cir. 1975), and *Boyd, supra;* also from the effect of the misjoinder upon defense strategy and preparation. *Daley* v. *United States*, 282 F.2d 818, 822 (9 Cir. 1960); see also *United States* v. *Pardone*, 400 F.2d 560 (2 Cir. 1969).

Even if joinder was initially proper under F.R.Cr.P. 8(a) and (b), the situation which developed upon dismissal of the conspiracy charge—the existence of which had (arguably) justified joinder[16]—resulted in irreparable prejudice to defendants requiring relief pursuant to F.R.Cr.P. 14.[17]

(B) *Use of Norman Leader's State misdemeanor theft conviction to impeach him.*

The jury was told by Norman, on cross-examination after he testified on his own behalf, that he had been convicted of theft 10 years before. (See p. 7, *supra*.)

(i) *"involving dishonesty"*

While ostensibly this was admitted for impeachment purposes per F.R.E. 609(a)(2),[18] in effect the jury, being told Norman had been a thief, would be more ready to believe that he was still a thief.

This is the very purpose for which other offenses are not to be considered. *Michelson* v. *United States*, 335 U.S. 469, 93 L.Ed. 168 (1948).[19]

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[16] App. A, p. App. 11.

[17] The Rules are set out at pp. 3-4, *supra*.

[18] See fn. 17, *supra*.

[19] "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant, on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 475-76, 93 L.Ed. at 173-74.

Accord, *Marshall* v. *United States*, 360 U.S. 310, 3 L.Ed.2d 1250 (1959); *Boyd* v. *United States*, 142 U.S. 450, 35 L.Ed. 1077 (1892).

Because a prior crime reflecting dishonesty (or false statements) is relevant to a witness' credibility, such crimes are allowed in evidence for impeachment purposes per F.R.E. 609(a)(2). But when the crime itself does not necessarily include such characterization, as here, (see p. 7, *supra*), there must be a showing that the facts of the particular prior offense reflect dishonesty. See *United States* v. *Papia*, 560 F.2d 827, 847 (7 Cir. 1977); *United States* v. *Fearwell*, 595 F.2d 771, 776 (D.C. Cir. 1978); *United States* v. *Dorsey*, 591 F.2d 992 (D.C. Cir. 1979); *United States* v. *Ashley*, 559 F.2d 975 (5 Cir. 1977); *United States* v. *Seamaster*, 568 F.2d 188 (10 Cir. 1978); *United States* v. *Ortega*, 561 F.2d 803 (9 Cir. 1977).

Here, the facts of Norman's 10-year-old misdemeanor theft conviction militate against any such finding. (See p. 7, *supra*.) If this conviction can come in, then the safeguards built into Rule 609(a)(2) crumble.

(ii) *Invalidity of Prior Conviction—Ineffective Assistance of Counsel.*

The salient facts are set out at pp. 7-8, *supra*.

Clearly, where counsel does not cross-examine a co-defendant so as to exonerate his client because he also represents the co-defendant—as here—there has been ineffective assistance of counsel due to the dual representation, per standards set down by Your Honors in *Cuyler* v. *Sullivan*, 446 U.S. 335, 64 L.Ed.2d 333 (1980). There was an actual conflict of interest that affected the lawyer's performance, as in *United States ex rel. Vriner* v. *Scott*, ... F.Supp. ....., (C.D. Ill., Feb. 4, 1980), granting habeas corpus.[20]

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[20] An appeal taken by the Attorney General of Illinois was dismissed on appellant's motion, No. 80-1244, 7 Cir.

From the State trial transcript, the conflict which actually became manifest at trial was apparent. The prior conviction was invalid due to the ineffective representation and therefore should not have been utilized to defendant's detriment. *Cf. Loper* v. *Beto*, 405 U.S. 473, 31 L.Ed.2d 374 (1972); *Burgett* v. *Texas*, 389 U.S. 109, 19 L.Ed.2d 319 (1967).

This Court should extend the rule barring the use against a defendant of convictions obtained without any counsel at all, *Loper & Burgett, supra*, to situations as here, where counsel, though present, was constitutionally ineffective.[21]

(C) *Improper verdict forms*

It is conceded that the verdict forms were improper, in that the jury was given no opportunity whatsoever to vote "not guilty" on counts 2, 3 or 4 as to either defendant. (See p. 8, *supra;* App. A, p. App. 14)[22]

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[21] Although the improper admission primarily violated the rights of Norman Leader, the defenses of David and Norman Leader were sufficiently intertwined so that improperly impinging upon Norman Leader's credibility also denied defendant David Leader a fair trial.

[22] The verdict forms submitted by the Court (prepared by the prosecutor) failed to provide the jury with all the alternatives available to it and impermissibly suggested to the jury that the open options were "all" or "none". The jury was given verdict forms that presented the alternative of finding each defendant guilty or not guilty as charged in the indictment and guilty or not guilty as to Counts 5 through 14, but *they were not submitted verdict forms permitting separate consideration of Counts 2, 3 and 4.* There was no verdict form allowing them to find the defendants not guilty of Counts 2, 3 and 4. Similarly, there were no means for the jury to find the defendants guilty on one of Counts 2, 3 and 4 and not guilty on any of the others.

The error was prejudicial to the defendants because the jury *was* given the opportunity to find co-defendant Modrich guilty on all

(footnote continued)

To perceive the prejudice inherent in this situation, one must appreciate the genuine severability of the various counts in the context of this case. Counts 2, 3 and 4 alleged that David and Norman Leader and Michael Modrich committed violations of 18 U.S.C. 2314 (transportation in interstate commerce), while counts 5 through 14 charged only the Leaders with mail fraud in violation of 18 U.S.C. 1341. With the differing elements between the two categories of offenses, it was entirely possible for the jury to acquit defendants as to one group of offenses while convicting as to the other. Therefore it was essential that the jury be given the opportunity to make such distinctions, and also that the court not indicate or intimate to the jury that they must find defendants guilty or not guilty as to *all* the pending counts. See *Braley* v. *Gladden*, 403 F.2d 858 (9 Cir. 1968); *United States* v. *DeMatteo*, 169 F.2d 798 (3 Cir. 1948);[23] *United States* v. *Crescent-Kelvan Co.*, 164 F.2d 582 (3 Cir. 1947).

The prejudice to defendants is similar to that in *Braley* v. *Gladden, supra*:

> "While a form for returning of a guilty verdict was supplied to the jury, the court inadvertently neglected

(footnote continued)
counts (through one verdict form so stating) or to return a verdict form indicating guilt or innocence separately as to all of the various counts in which he was charged. The distinction between the situations presented to the jury as to the defendant Modrich versus the Leader defendants could be interpreted by a juror as a judicial statement that while verdicts on distinct counts could be returned as to defendant Modrich, the jury must find the defendants guilty on Counts 2, 3 and 4, if they choose to find them guilty on one or more of the Counts 5 through 14.

[23] "Obviously in every case where there are two or more counts in an indictment, proper practice will require the jury to render a separate verdict on each count." *Id.* at 801.

to supply the usual form for the returning of a verdict of acquittal." 403 F.2d at 859. (reversing)[24]

Moreover, errors which mistakenly communicate to the jury that separate verdicts are not required as to separate counts rise to the level of "plain error," noticeable per F.R.Cr.P. 52 even though defense counsel did not object; *cf.* App. A, p. App. 14. *United States* v. *Schmidt*, 376 F.2d 751, 754 (4 Cir. 1967).

Defendants at bar were deprived of their constitutional right to separate jury consideration on each individual count.[25]

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[24] "Critical deficiencies cannot be supplied by inference or assumption as to the interpretation applied subjectively by twelve jurors, individually and collectively. While it may not be unreasonable to assume that the jury inferred from the instructions that it might be empowered to write its own form of a verdict of not guilty, it is equally reasonable to assume that the jury inferred that the judge intended that only one verdict was possible, a verdict of guilty upon the one and only form which he supplied." 403 F.2d at 860.

Although the implicit comment here is different from that in *Braley*, it is no less prejudicial and erroneous.

See also *United States* v. *Cudd*, 499 F.2d 1239 (10 Cir. 1974), reversing where the trial court did not permit the jury to distinguish between two defendants in the return of verdicts.

[25] That the jury was polled (App. A, p. App. 15) cannot undercut the prejudice, for the poll did not delineate as between the separate counts. When polled, the jurors were only asked whether the verdict returned was and is the verdict of each juror, not whether this was so as to each of the 14 counts (*i.e.*, 2 through 15) as to which guilty verdicts had been returned. Moreover, no poll possibly could uncover the thought processes of the jurors as to the manner in which they deliberated under the sway of the incomplete set of verdict forms.

Certiorari should be allowed so that this Court may resolve the serious and perplexing procedural questions here presented, each of which affects the substantial constitutional rights of defendants within the federal criminal justice system.

And, on the merits, defendants' convictions should be reversed and remanded with appropriate directions.

2.

The decision below condones violation of defendants' due process rights, contrary to the requirements of Sandstrom v. Montana, 442 U.S. 510, and at odds with principles of such cases as Leary v. United States, 395 U.S. 6, where the jury was instructed over defense objection that "No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate," whereby the jury was permitted to find the essential element of guilty knowledge on the basis of mere negligence through the use of a constitutionally impermissible inference or presumption which effectively shifts the burden of proof away from the prosecution and violates the defendants' presumption of innocence. Certiorari should be allowed to eliminate the widespread use of this dangerous instruction.

Over defense objection, the court instructed the jury:

> "No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him to investigate." (Tr. 1342)

The defense was that defendants lacked guilty knowledge, an essential element of the offenses. (See statutes, pp. 2-3, *supra*.) There was considerable credible evidence supporting this theory. (See fn. 14 *supra* and accompanying text.) The instruction herein complained of, for all practical purposes, destroyed this viable defense.

The instruction effectively told the jury that if there are "facts which should prompt him to investigate,"[26] the knowledge element of the offenses is presumed to exist. This is an unconstitutional presumption. *Cf. Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39 (1979)[27]; *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 57 L.Ed.2d 854 (1978).[28] It conclusively advises the jury that knowledge is to be presumed, regardless of what the evidence may actually show as to knowledge, if they find defendant avoided knowledge by "closing his eyes to facts which should prompt him to investigate."

The instruction is even worse in its context; for it appeared thus:

> "The word 'knowingly' as used in the crimes charged means that the act was done voluntarily and purposely, and *not because of mistake or accident.* Knowledge may be proven by defendant's conduct, and by all the facts and circumstances surrounding the case. *No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate."* (Tr. 1342) (Emphasis added.)

By following so closely upon the language that knowledge may not be based on mistake or accident, the instruction

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[26] Still another vice of the instruction is that there are no standards or guidelines as to how to determine when this state of affairs exists, *i.e.*, "should" according to whom?

[27] The instruction condemned in *Sandstrom*, requiring reversal, was:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts." 61 L.Ed.2d at 45.

[28] The invalid instruction requiring reversal in *Gypsum* was:

> "The law presumes that a person intends the necessary and natural consequences of his acts." 57 L.Ed.2d at 865.

complained of negates this concept, advising the jury that accident or mistake *can* be equated with knowledge if the accident or mistake results from one's failure to investigate.

This instruction has the constitutionally forbidden effect of diluting the government's burden of proof; it makes a mockery of the concept of presumption of innocence; and it permits, nay, encourages, the jury to find a defendant guilty based on mere negligence.

In *Sandstrom* v. *Montana, supra*, this Court held that, in determining whether a complained-of instruction deprived a defendant of his constitutional rights,

> "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could have* interpreted the instruction." *Id.* at 514, 61 L.Ed.2d at 45. (Emphasis added.)

Here, where there was a legitimate issue upon the facts as to defendants' respective states of mind when they performed certain acts, giving this instruction might well have tipped the scales.

A defendant's mental state is an essential element of the offenses of which defendants stand convicted. The defendant's presumption of innocence and the requirement of proof of each element of the offense beyond a reasonable doubt are constitutional requirements. *In Re Winship*, 397 U.S. 358 (1970); *Cool* v. *United States*, 409 U.S. 100 (1972). The instruction, which allows a finding of mental culpability upon facts demonstrating mere negligence, thus permits the jury to infer guilty knowledge from a defendant's failure to investigate, *i.e.*, from his negligence.

Under the instruction complained of, the jury *could have*, per the *Sandstrom* standard, utilized a constitutionally for-

bidden presumption. *Cf. Sandstrom, supra,* 442 U.S. at 514-19, 61 L.Ed.2d at 45-48.

Because the charge to the jury contained an instruction which permitted the jury to use an unconstitutional presumption against defendants as to guilty knowledge, defendants were deprived of a constitutionally fair trial.

* * *

The instruction is also unconstitutional for the alternate reason that it permits an irrational presumption of the elemental fact, *i.e.*, knowledge, from the proven fact, *i.e.*, failure to investigate. See *Leary* v. *United States,* 395 U.S. 6, 23 L.Ed.2d 57 (1969).[29]

* * *

The reviewing court has concluded, without rhyme or reason, that the instruction does not involve any presumption or any shift in the burden of proof. (App. A, p. App. 11) It relies wholly on a line of Seventh Circuit cases[30] which approved such instruction *prior* to this Court's decision in *Sandstrom.* (App. A, p. App. 10) The instant decision should be scrutinized by this Court in light of *Sandstrom,* for the Seventh Circuit's analysis is indefensible in the face of *Sandstrom's* logic.

Though the instruction may have an "impressive historical basis," *cf. Barnes* v. *United States,* 412 U.S. 837, 37 L.Ed.2d 380 (1973),

> "[this] is not in itself sufficient to establish the instruction's constitutionality. Common-law inferences, like their statutory counterparts, must satisfy due

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[29] *Cf.* the following cases, all of which were cited and relied on in *Leary, supra: Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); *Haynes* v. *United States,* 390 U.S. 85 (1968); *Tot* v. *United States,* 319 U.S. 463 (1943).

[30] *United States* v. *Prewitt,* 553 F.2d 1082, 1087 (7 Cir. 1977); *United States* v. *Gabriel,* 597 F.2d 95, 100 (7 Cir. 1979).

process standards in light of present-day experience." *Id.* at 844, 37 L.Ed.2d at 387.

* * *

Certiorari should be allowed to eliminate the widespread use of this dangerous instruction.

On the merits, because this erroneous jury instruction, which permitted the jurors to presume elemental facts against the defendants, may well have diluted the burden of proof which the Constitution places on the prosecution and operated impermissibly to shift the burden of proof to the defendants, their convictions should be reversed.

3.

The decision below seriously erodes the due process standards relative to the government's burden to prove every element of the offense beyond a reasonable doubt, In Re Winship, 397 U.S. 358, by affirming upon evidence which—minus the evidence inadmissible per Questions 1(A) & 1(B), and but for the prejudicial procedural errors in the verdict forms and instructions per Questions 1(C) & 2—is legally insufficient as a matter of law to establish the essential element of guilty knowledge. Certiorari should be allowed to clarify the applicability of Jackson v. Virginia, 443 U.S. 307, to federal convictions, and so this Court may specify that the Jackson due process evidentiary standard requires consideration of only the legally competent, admissible evidence.

Under the due process standard recently set out by this Court in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed.2d 560 (1979), incorporating principles expressed in *In re Winship*, 397 U.S. 358, 361-64, 25 L.Ed.2d 368, 373-75 (1970), a conviction cannot stand if, taking the evidence most

favorably to the government, no reasonable jury could have found defendants guilty as to each element of the offense. 443 U.S. at 324, 61 L.Ed.2d at 576-77. While *Jackson* itself dealt with the standards to be applied by a federal court when evaluating the sufficiency of the evidence to support a State conviction under due process criteria, the test therein set forth must minimally be met before a federal conviction may be upheld against the same defense contention—that is, that the evidence is insufficient, per due process standards, to prove one or more of the substantive elements of the offense. See, *e.g.*, *United States* v. *Tranowski*, 659 F.2d 750 (7 Cir. 1981), applying (without discussion) the *Jackson* standard to a federal conviction, and, finding the admissible evidence insufficient, reversing.

Tranowski made it clear that, in applying the *Jackson* standard, only competent, admissible evidence is to be considered. *Id.* at 757.

Here, the evidence which was prejudicial and incompetent for various reasons as above set forth (Reasons 1(A) & (B)) must have persuaded the jury to convict, along with the erroneous and prejudicial instruction, (Reason 2); for absent this evidence there is insufficient proof of guilty knowledge, an essential element of the offenses.

* * *

Such proof is not found here, where defendants' conduct was not secretive, but instead most open so as to negate any presumption of guilt from association with either the stolen items or persons who possessed the stolen items. *Cherry* v. *United States*, 78 F.2d 334 (7 Cir. 1935). Here Peters no. 2 had an apartment in a building owned by David Leader; Mr. Leader introduced him to the owner of a currency exchange where Mr. Leader was well known;

checks negotiated were not handled secretly but openly. More importantly, all transactions had by "Mr. Peters" in negotiating checks were *after* his signature was notarized on the stock certificates by Mr. Topp (a government witness) who notarized Mr. Peters' name only after the man showed proper identification. (Tr. 487) Topp testified:

> "Q. And at that time he showed you some type of identification, is that correct?
> A. Yes.
> Q. Do you recall what the identification was?
> A. No, I don't.
> Q. So you don't know if it was a driver's license or a social security card but it was something of that nature which people normally need to produce identification?
> A. Yes." (Tr. 487)

Here, there was not one iota of real evidence that defendant David or Norman Leader was aware that the person whom they knew as Mr. Peters was not the lawful owner of the stock.

* * *

This is one of those rare cases where the reviewing court should reverse because of the trial court's failure to direct a verdict for the defendants. See *Hinton* v. *United States*, 196 F.2d 605 (D.C. Cir. 1952). Moreover,

> "... while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof ..." *United States* v. *Litberg*, 175 F.2d 20, 21 (7 Cir. 1949).

The government's proof cannot be supplied by mere speculation or conjecture. *United States* v. *Diggs*, 527 F.2d 509 (8 Cir. 1975). In reversing, the court stated:

> "While the facts proved by the government were certainly suspicious, a jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture. And we do not think that the deficiencies in the government's proof can be supplied by saying that if the defendant was innocent, he could have explained his connection with the checks and his actions with respect to them." *Id.* at 513.

* * *

Certiorari should be allowed to clarify the applicability of *Jackson* v. *Virginia*, *supra*, to federal convictions, and so this Court may specify that the *Jackson* due process evidentiary standard requires consideration of only the legally competent, admissible evidence.

Here, where there is nothing more than speculation as to the essential element of defendants' knowledge, the convictions should be reversed.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be allowed. And, on the merits, defendants' convictions should be reversed for insufficiency of the evidence; alternatively, the cause should be reversed and remanded with appropriate directions.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED APRIL 28, 1981)
November 9, 1981.
Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Inzer B. Wyatt, Senior District Judge*

No. 80-1825

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DAVID LEADER and NORMAN LEADER,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79-CR-180-2, 3
GEORGE N. LEIGHTON, Judge.

ORDER

David Leader and Norman Leader (brothers; hereafter "David", Norman"), appeal jointly (Fed.R.App.P. 3(b))

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* Senior District Judge Inzer B. Wyatt of the Southern District of New York is sitting by designation.

from separate judgments of conviction on thirteen counts of an indictment. After trial, a jury had returned a verdict of guilty of those counts.

We affirm the judgments from which the appeal is taken.

1.

The trial was of a second superseding indictment. In this indictment David and Norman were charged with others in the first four counts and were charged jointly in the last ten counts.

Count One charged David, Norman, and three others with conspiracy (18 U.S.C. § 371) to violate 18 U.S.C. § 2314 by causing to be transported in interstate commerce stolen securities and forged securities. At the close of the Government's case the trial court, on motion, entered a judgment of acquittal as to all defendants on the conspiracy count (Fed.R.Crim.P. 29(a)).

Counts Two, Three, and Four charged David, Norman, and Michael Modrich with substantive violations of 18 U.S.C. § 2314 in that they knowingly caused stolen securities to be transported in interstate commerce. Counts Five through Fourteen charged David and Norman with violations of the mail fraud statute (18 U.S.C. § 1341) in that they devised a scheme to obtain money by fraud from Rodman and Renshaw (hereafter "Rodman"), Chicago brokerage firm. The scheme involved false representations to Rodman that Ralph Peters lived in an apartment building operated by David and Norman; delivery to Rodman of stock certificates in the name of Ralph N. Peters along with the forged endorsement of Ralph Peters; arrangements by David and Norman that Rodman should send by mail in payment for the stolen and forged certificates checks payable to Ralph Peters and addressed to Ralph Peters at the apartment building operated by David and Norman; and the obtaining and cashing of those checks by David and Norman.

2.

A rational jury could find beyond a reasonable doubt from the evidence the following state of affairs.

At some time within a few weeks after December 16, 1977, a number of stock certificates in the name of Ralph N. Peters were stolen from the Chicago office of the Illinois Department of Financial Transactions hereafter "the Department"). Ralph N. Peters was a prominent and wealthy broker in Chicago. How the certificates in his name, placed in a safe deposit box in December 1967, got into the hands of the Illinois Department of Financial Transactions is an interesting matter, but is irrelevant to this appeal.

The stolen stock certificates in the name of Ralph N. Peters, in some way not disclosed by the credible evidence, came into the possession of the Leaders.

On February 9, 1978, a man telephoned Rodman, identified himself as Norman Leader, and said that he was calling on behalf of Ralph Peters, who was moving into one of the Leader apartments; that Peters had a bad leg, had just returned from the Mayo Clinic, could get around only with difficulty, should therefore be telephoned after nine o'clock in the morning, and had no telephone as yet but that one would be installed over the weekend (February 9, 1978), was a Thursday). While the testimony was not specific on the point, it seemed evident that Norman wanted to open an account with Rodman for Ralph Peters so that stock in the name of Peters could be sold through Rodman. In his testimony, Norman admitted making the telephone call to Rodman, claiming that Ralph Peters asked him if he knew a broker and he supplied Peters with Rodman. Norman also admitted that he learned that Peters had many stock certificates.

On the morning of Friday, February 10, 1978, an installer for the telephone in 3002 West Irving Park, Apartment 5, for account of Ralph Peters. The assigned telephone number was 267-2611.

The building at 3000-3002 West Irving Park Road is owned by David. It is two story, red brick, with a tavern-liquor store and an empty store on the first floor and 13 apartments on the second floor. The tavern-liquor store also had an off-track betting service. The building was operated by David and Norman, who also operated the tavern-liquor store.

The installer went to Apartment 5 on the morning of February 10, but no one was there. He then went looking for Peters in the tavern-liquor store downstairs. A man behind the bar there told him that Peters was not there but he—the man behind the bar—would admit the installer to Apartment 5. He did so, presumably with a key to a lock, and the telephone was duly installed. Apartment 5 was one big room with a few articles of furniture and no observable personal effects. The installer never saw any Ralph Peters and from photographs identified Norman as the man from the tavern-liquor store who admitted him to Apartment 5.

Later on February 10, a man telephoned Rodman and identified himself as Ralph Peters. He gave his telephone number as 267-2611, the number of the telephone installed in Apartment 5 that morning. He gave his address as 3002 West Irving Park. He said he had some shares to sell, specifically 1000 Dun & Bradstreet. Rodman advised him that with a new customer, the firm had to have the stock in hand before a sale would be made. The caller said he would send the certificates by "Bullet Messenger Service."

On February 14, a messenger from Bullet Messenger Service went to Apartment 5 at 3000-02 West Irving Park. There a man gave him an envelope to deliver to Rodman, paid him for the service and asked for a receipt in the name of Ralph Peters. The delivery was made to Rodman. The envelope contained certificates representing 1000 shares of Dun & Bradstreet and 1000 shares of R. R. Donnelly, all in the name of Ralph N. Peters. These certificates had been stolen from the Department. Later, the messenger, from photographs, identified Norman as the man who gave him the envelope with the stolen stock certificates.

On March 17, 1981, David delivered to Rodman certificates in the name of Ralph N. Peters representing 100 IBM, 266 Union Carbide, 115 International Paper, and 600 Eastman Kodak. These certificates had been stolen from the Department.

On March 27, 1981, there were delivered to Rodman certificates in the name of Ralph N. Peters representing 1000 Dun & Bradstreet and 1000 R. R. Donnelly. These certificates had been stolen from the Department. There is no evidence showing by whom the delivery to Rodman was made.

The shares represented by the stock certificates delivered to Rodman were sold on a stock exchange. The proceeds of the sales were then remitted by Rodman by means of ten checks. These ten checks were drawn by Rodman payable to Ralph Peters, Apartment 5, 3002 West Irving Park, Chicago, Illinois. They were sent by Rodman by mail to the payee at the address shown on the check.

The first Rodman check, for $27,582.09, was endorsed in the name of Ralph Peters, was then endorsed by Nor-

man, and was then deposited in the bank account of Corina, Inc., a business owned by David and Norman and which operated a store under the name "Buffalo Records and Tapes", selling music records and tapes.

The second Rodman check, for $2,299.33, was endorsed in the name of Peters, was then endorsed by Norman, and was given by Norman to Galgano, a supplier to the Leaders of records and tapes. Presumably the check was paid by the Leaders to Galgano for merchandise.

Six of the Rodman checks, in the aggregate $103,429.28, (chronologically the third, fourth, fifth, seventh, ninth, and tenth), were deposited in an account in the name of Ralph N. Peters at First National Bank of Lincolnwood, an institution near where Norman's wife and children lived in a Chicago suburb. The fingerprints of Norman were on one of the six checks deposited in the Lincolnwood Bank as well as on the deposit slip accompanying that check. The last Rodman check, the tenth, was one of the six deposited in the Lincolnwood bank; it was for $4,537.32 but was not honored by Rodman's bank because Rodman by then had discovered the fraud and had stopped payment on the check. The Lincolnwood account in the name of Ralph N. Peters was opened by mail and telephone on February 28, 1978; no one at the Lincolnwood bank ever saw any Ralph Peters. A person telephoned the bank, said he was Ralph Peters, and explained that he could not come to the bank to open an account because he was an invalid and in traction. The bank obtained *by mail* the information necessary and the signature of the presumed depositor. Against the Rodman checks deposited in the Peters' Lincolnwood bank account, sixteen checks were drawn. Two of these were payable to David who presumably used the money proceeds for his personal purposes. Fourteen of the checks were payable to cash or to Ralph Peters. The endorsement of

David or Norman was on each of the fourteen checks, presumably with that of "Ralph Peters." There is evidence as to the disposition of eleven of these fourteen checks. Seven were cashed by David or Norman at currency exchanges and the money proceeds evidently were used for their personal purposes; four of the checks were given by Norman to Galgano, the supplier of merchandise to the Leaders. What happened to the other three checks on the Lincolnwood account is not shown by the evidence, but since the last endorsement was that of David or Norman, one of them must have received the money proceeds and used them for personal purposes.

The sixth Rodman check chronologically, for $8,515.02, was cashed by David or Norman at a currency exchange and the money proceeds evidently used for personal purposes.

To summarize what happened to the proceeds of the ten checks issued by Rodman: payment was stopped on the tenth check ($4,537.32); the gross proceeds of the nine Rodman checks paid by Rodman's bank were $142,975.47. As a result of a restraining order secured by Rodman, the Lincolnwood bank account was frozen on April 16, 1978, at which time the balance in the account was $82,990.30, and this was returned to Rodman. The net loss to Rodman, therefore, was $59,985.17. The evidence shows that this money was either received in currency by David and Norman, was deposited in the bank account of a business owned by them, or was used for their benefit (as payment for merchandise purchased). There is no evidence that anybody claiming to be Ralph N. Peters or Ralph Peters received any of the proceeds of any of the Rodman checks.

When the stock certificates in the name of Ralph N. Peters came into possession of the Leaders, it must have been at once apparent to them that an endorsement of the

certificates in the name of Ralph N. Peters was required before they could be offered for sale. The Leaders knew that it was out of the question to suppose that the real Ralph N. Peters would supply his endorsement. At that time and at all relevant times, Ralph N. Peters was a stock broker in Chicago with his own brokerage firm, Peters & Company, of which he was the head. He had been Chairman of the Chicago Board of Trade. He was a prominent and wealthy man. He testified at the trial that when he went to reclaim the stock certificates he had placed in a safe deposit box in December 1967, he found that the box had been opened by the bank for non-payment of rent, and its contents taken into custody by the bank; that his insurance company in 1972 replaced the old certificates; and that when certificates are replaced, the old certificates are cancelled so that no other replacements can be issued and that this is a "stop transfer" against the old certificates. Not knowing of the replacement of the old certificates in 1972, however, nor of the "stop transfer" against them, the Leaders undoubtedly hoped or believed, or both, that a forged endorsement on the old certificates would enable them to be transferred.

David Leader had found someone who forged the name "Ralph N. Peters" as an endorsement, or direction to transfer, on the stock certificates in that name stolen from the Department. These included the certificates which were delivered for sale to Rodman. It was apparently believed that an acknowledgment of the signature "Ralph N. Peters" was necessary, or would aid in the sale of the certificates. David selected for this purpose a pliable notary public in his neighborhood. This was Topp, the long-time operator of the Chicago Currency Exchange, whose business was near those of David and Norman, who had known them for some ten years and who had done much business

with them. Topp recognized his signatures as notary for the signatures of "Peters" on the stock certificates, but seemed to remember little about his acting as such. He did not know the person claiming to be Peters, but said that the person came in with David and was introduced by David; the person showed some sort of identification, according to Topp, but Topp could not remember what it was. The real Ralph N. Peters was a witness at the trial, denied that the signatures on the stock certificates were his, and denied that he had ever had anything to do with David, Norman, or Topp.

As soon as Rodman had sold some of the stolen certificates, they had to be sent to the transfer agents to be transferred from the name of Ralph N. Peters to the names of the new purchasers. These stolen certificates had been issued and dated before December 1967, and had been subject to "stop transfer" orders since 1972. The transfer agents accordingly refused to make the transfers. Rodman thus discovered the fraud. Investigation then began, after which the matter was presented to a grand jury and an indictment returned.

3.

The theory of the Government as to Counts Two, Three and Four was that the Leaders knew that the certificates described in those counts had been stolen and forged (they had themselves arranged for the forgery of the signature of Ralph N. Peters) and that, by selling them through Rodman on a stock exchange, they caused their transportation in interstate commerce when the certificates were sent to transfer agents in New York for transfer.

The theory of the Government as to Counts Five through Fourteen was that the Leaders caused Rodman to sell stolen stock certificates and to pay over the sale proceeds:

this was a fraud on Rodman. The jurisdictional basis for the mail fraud charges was the use of the mails for delivery of the ten Rodman checks to the address of the apartment house owned and operated by the Leaders.

The key element in the fraud theory was that the Ralph Peters who pretended by telephone or by mail to be opening a brokerage account with Rodman, and opening a bank account with the Lincolnwood bank, never existed. David and Norman, either themselves or by use of impostors, made the telephone calls and the mailings to Rodman and to the Lincolnwood bank; it was an impostor who acknowledged the signatures to Topp.

After the Government had submitted its evidence to the jury, Norman put in a defense case, consisting of his own testimony and that of Alleruzzo, a neighborhood lawyer. David did not put in a defense case.

4.

The first point made on this appeal is that the trial judge erroneously charged the jury as follows (Tr. 1342): "No person can intentionally avoid knowledge by closing his or her eyes to facts which should prompt him or her to investigate." The instruction was not erroneous but was correct. It was approved by this Court in *United States* v. *Prewitt*, 553 F.2d 1082, 1087 (7th Cir. 1977), and the approval reaffirmed in *United States* v. *Gabriel*, 597 F.2d 95, 100 (7th Cir.), *cert. denied*, 444 U.S. 858 (1979). Decisions dealing with presumption instructions in criminal cases are cited by appellants, such as *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), where the instruction was that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Such instructions are held to violate due process because the presumption shifts the burden of proof to the defendant. The instruction be-

fore us does not involve any presumption nor any shift of the burden of proof. The decisions cited for appellants are not applicable here.

5.

It is argued for reversal that trial of appellants with the co-conspirators named in the first count, on which judgment of acquittal was entered at the close of the Government's case, denied appellants a fair trial.

It is difficult to tell whether the argument is that there was a "misjoinder" from the beginning or that, after judgment of acquittal by the Court on the conspiracy count, there should have been a mistrial as to all the substantive counts.

The docket sheet in the District Court shows that the defendants early moved for a severance. We are told by the Government (Brief, p. 24, fn. 7) that this motion was denied, and it must have been since there was no severance. We have no doubt that the joinder of all defendants in the successive indictments was proper because of the charge of conspiracy in Count One. That Count sufficiently avers that the named defendants "participated . . . in the same series of acts or transactions constituting an offense or offenses." Fed.R.Crim.P. 8(b).

When the judgment of acquittal of the conspiracy count was ordered after presentation of the Government's evidence, Fed.R.Crim.P. 14 requires that a severance of defendants be granted if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . .". A motion was made for a severance (mistrial) but was denied (Tr. 982). The question then is simply whether prejudice to the Leaders is sufficiently shown from the presentation to the jury of the evidence on the conspiracy count. *Schaffer* v. *United States*, 362 U.S. 511 (1960). Appellants point

only to testimony of two witnesses as to transactions with Scott, charged in the conspiracy count, and to remarks of defense counsel in opening statements, forced (it is said) by inclusion of the conspiracy count. Considering the strong case against the Leaders made out by the Government's case on the substantive counts, we are unable to find any prejudice to them from the relatively insignificant testimony as to Scott, and from the strategy claimed to have been required in opening statements for them. *See United States* v. *Johnson*, 515 F.2d 730, 736 (7th Cir. 1975).

6.

Error is assigned because the trial court permitted Norman, who gave testimony, to be cross-examined on March 26, 1980, about a state misdemeanor conviction on February 17, 1971. The cross-examination on this topic consisted of one question and one answer (Tr. 1071):

Q. Finally, sir, it is a fact, is it not, that you have previously been convicted for theft?

A. Yes, it is, ten years ago.

The conviction was apparently for possession of five leather jackets, knowing that they had been stolen.

The state conviction was for a misdemeanor and could properly be used to impeach Norman only if the crime "involved dishonesty or false statement." Fed. R. Ev. 609 (a)(2). Appellants argue here that it was not shown that the crime did involve dishonesty or false statement, in the sense of deceit or falsification, as required in some circuits and not in others. Were we required to decide this issue, we might incline to agree with appellants. This Court does not appear to have decided whether theft involves "dishonesty" in the absence of evidence that deceit or falsification was employed. The problem is thoroughly dis-

cussed by Judge Bauer in *United States* v. *Papia*, 560 F.2d 827, 845-48 (7th Cir. 1977), which did not decide the problem and which in this respect seems to have been misunderstood by the trial judge in the case at bar.

We are not required now to decide the problem because no claim was made for appellants in the trial court that an element of deceit or falsification had to be shown before conviction of a theft misdemeanor could be used for impeachment. Not having been raised below, we should not notice the point now.

Appellants did make a contention to the trial court that the misdemeanor conviction was invalid because there were two defendants, David and Norman; that they were represented by the same retained lawyer; that there was a conflict of interest; and that they were denied effective representation of counsel. The trial judge ruled that the conflict of interest claim was not established in fact and had never even been raised in the state court. We find no error in this ruling. We note also that, as to prior convictions, the claim of ineffective assistance of counsel, inherent in the assertion of a conflict of interest between two defendants, is different in character from a claim established in fact that a defendant in a criminal case was denied any assistance of counsel. It was this last claim which was successfully made in such cases as *Loper* v. *Beto*, 405 U.S. 473 (1972) and *Burgett* v. *Texas*, 389 U.S. 109 (1967), on which appellants now rely.

If, however, it were assumed to be error, for one or both of the reasons advanced here for appellants, to allow use of the misdemeanor conviction for impeachment of Norman, the error could not have prejudiced Norman so as to require reversal. There was one short question and use of the one word "theft". Norman, in his answer, re-

ferred to the nearly ten-year lapse of time. This was not a close case; the evidence against Norman (as well as David) can fairly be said to have been overwhelming.

7.

It is argued that the verdict forms given to the jury were improper and denied David and Norman a fair trial. We agree that the verdict forms were improper but we are confident that the error did not deny the Leaders a fair trial nor affect the result in any way.

The Government prepared three separate verdict forms as to each defendant. As to David and Norman, the first form of verdict was "Guilty as charged in the Indictment", meaning guilty of each count in which named; the second form of verdict was "Not Guilty as charged in the Indictment", meaning not guilty of each count in which named; the third form of verdict was designed to permit a finding of guilty as to some counts and not guilty as to tohers. The third form had the counts listed in a column by number and opposite each count were two spaces, one to report a "Guilty" verdict and the other to report a "Not Guilty" verdict. The error was that on the third form the counts listed were Counts Five through Fourteen only, whereas the Leaders were named in Counts Two through Fourteen. Counts Two, Three and Four were omitted; they should have been included.

Copies of the verdict forms were given to defense counsel. No objection was made to the omission from the third form of Counts Two, Three, and Four.

The verdict forms were given by the Government to the trial judge and, without objection, were given by him to the jury.

The jury retired at some time on the afternoon of Thursday, March 27, 1980, and brought in its verdict at 2 p.m. on March 28, 1980. So far as the record shows, no questions were asked by the jury during its deliberations. The jury, as to David and as to Norman, returned the first form of verdict, signed by each juror,—"Guilty as charged in the Indictment". The jury was then polled.

When the jury verdict was taken, no question was raised about the verdict forms and, specifically, no question was raised about the omission of three counts from the third form of verdict.

While we recognize that the third from of verdict was faulty, there is no showing that the fault misled or confused the jury in any respect or that it in any way affected the result. There is thus no reason shown for us to disturb that result.

8.

Finally, appellants assert that the Government's evidence did not establish "a prima facie case against the Leader defendants and is insufficient to sustain a conviction". We do not believe that this assertion, in the face of the strong evidence for the Government, merits anything more than a brief discussion here.

There is no clear statement of any defense theory but, as we understand the theory attempted, it is that David and Norman were deceived by "Peters no. 2" (Brief, p. 31) who was the real villain and who used the innocent Leaders to sell his stolen stock certificates. The Leaders say that there is "not one iota of real evidence" that they knew that "Peters no. 2" did not own the stock. In short, they did not know that the stock certificates were stolen.

The defense theory is not only contrary to the record evidence, but fails to deal with the basic government posi-

tion that there never was any "Peters no. 2" and that the Leaders, by fake telephone calls, fake mailings, and fake signatures, created a fictitious "Ralph N. Peters" in order to sell stock certificates which they knew had been stolen. The evidence fully supports the Government's position.

If "Peters no. 2" had owned, since before December 1967, publicly traded stock certificates valued at over a hundred thousand dollars, why would he come to live in a spare, one-room apartment over a tavern-liquor store?

If "Peters no. 2" had owned valuable stock exchange securities since before December 1967, why would he need the Leaders to cash checks, find a stock broker, and find a bank for him?

If "Peters no. 2" in fact lived for a few months over the tavern-liquor store, why is it that other tenants in the same relatively small building never saw him there?

If "Peters no. 2" was selling, with the help of the Leaders, valuable securities which he had owned for more than ten years, at the least, why would all the proceeds go to the Leaders and none of the proceeds go to "Peters no. 2", the owner of the securities?

Aside from Norman, the only persons who testified that they ever saw a person claiming to be Ralph Peters were Topp, the neighborhood check casher and notary public, and Alleruzzo, the neighborhood lawyer. They were procured by David and Norman to asssit. According to their testimony, they did not know Peters, saw him once, and either did not ask him for identification or could not remember what identification (if any) he showed them. The person who claimed to Topp and to Alleruzzo to be "Ralph Peters" could only have been an impostor.

Aside from the other evidence, the jury could well have concluded from the inconsistent activities of the Leaders and from their inconsistent statements about the physical condition of "Ralph Peters" that no person such as described by the Leaders ever existed. On the one hand, it was necessary to explain to Rodman and to the Lincolnwood bank why "Peters" could not follow the normal and usual procedure of opening *in person* his bank account and his brokerage account. According to the testimony of Edelstein, who acted for Rodman and who was a disinterested witness, Norman told him that "Peters" was a man who "had a health problem, his health was bad, he couldn't move around and he returned from the Mayo Clinic" and that "it would be very difficult for him to get out of bed" (Tr. 638). According to the testimony of Callahan, who acted for the Lincolnwood bank and who was a disinterested witness, the person who telephoned about opening a Ralph Peters bank account explained that he could not come to the bank because he was "in traction" (as we understand it, this would mean that he could not leave his bed). On the other hand, it was apparently felt necessary by the Leaders that the forged signature of "Ralph Peters" be acknowledged before a notary. This meant that someone impersonating Peters had to appear before a notary; this was done. It may have been felt necessary by the Leaders to have someone other than the notary see a "Ralph Peters". This would explain the appearance of an impostor before the neighborhood lawyer. And in his testimony, Norman said that the only physical problem "Peters" had was that "occasionally he limped", that he had never been "in traction", that he could reach the telephone, and that Norman had seen "Peters" in "numerous places" (Tr. 1046-1049). If so, why did not "Peters no. 2"

himself go to Rodman and to the Lincolnwood bank and himself transact his own business involving substantial property? The jury would have been fully justified in rejecting Norman's testimony as incredible, as the jury must have done.

AFFIRMED.

There was abundant evidence from which a rational jury could have found these appellants guilty as charged.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illnois 60604

(ARGUED APRIL 28, 1981)
November 9, 1981.
Before
Hon. Walter J. Cummings, Chief Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Inzer B. Wyatt, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 80-1914 vs.

MICHAEL C. MODRICH,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-180-1
GEORGE N. LEIGHTON, *Judge*.

ORDER

The Government appeals from an order granting a motion for defendant Modrich under Fed.R.Crim.P. 29(c) for a judgment of acquittal of three counts of an indictment.

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* Senior District Judge Inzer B. Wyatt of the Southern District of New York is sitting by designation.

After trial, a jury had returned a verdict of guilty of those counts.

We have jurisdiction of the appeal as one authorized by 18 U.S.C. § 3731. *United States* v. *Blasco*, 581 F.2d 681, 682-84 (7th Cir.), *cert. denied*, 439 U.S. 966 (1978).

We affirm the order from which the appeal is taken.

1.

The trial was of a second superseding indictment filed December 19, 1979. In this indictment Modrich was charged with others in the first four counts.

Count I charged Modrich and four others with conspiracy (18 U.S.C. § 371) to violate 18 U.S.C. § 2314 by causing to be transported in interstate commerce stolen securities and forged securities. At the close of the Government's case the trial court, on motion, entered a judgment of acquittal as to all defendants on the conspiracy count (Fed. R.Crim.P. 29(a)).

Counts II, III, and IV charged Modrich, David Leader, and Norman Leader with substantive violations of 18 U.S.C. § 2314 in that they knowingly caused stolen securities to be transported in interstate commerce. On these counts, the jury found all defendants guilty.

Motions by the two Leader defendants for judgment of acquittal (Fed.R.Crim.P. 29(c)) were denied.

A similar motion by Modrich was granted and judgment of acquittal as to him of Counts II, III, and IV was entered. This appeal followed.

2.

Modrich was the supervisor, the person in charge of, the Chicago Office of the Abandoned Property Division (usually referred to hereafter as "the Division") of the

Department of Financial Institutions of the State of Illinois (usually referred to hereafter as "the Department"). The Division had its principal office in Springfield, the state capital, and had another office in Chicago. The Division, among its other functions, received and was responsible for the unclaimed contents of safe deposit boxes in banks. Such contents were turned over to the Department by the banks under a state law requiring them to do so when the safe deposit boxes had been abandoned or unclaimed, and when their contents had been held by the bank for a specified number of years.

In December 1967 a safe deposit box had been rented at American National Bank in Chicago by Ralph Peters, a man of some wealth. The contents were later "abandoned" by Peters under circumstances somewhat unusual but irrelevant to this appeal. The Bank took the contents into custody under the state law mentioned. There were a number of stock certificates in the Peters box.

In November 1977 American National Bank delivered to the Department in Springfield two cartons containing some 70 sealed envelopes. In each envelope were the abandoned or unclaimed contents of a safe deposit box. In one envelope were the contents of the Peters safe deposit box.

In December 1977 the Department decided to transfer from Springfield to its Chicago office all the unclaimed contents of safe deposit boxes then in its custody. It was intended to inventory the property in Chicago in preparation for its sale at auction.

Modrich and another employee in the Division went to Springfield on December 16, 1977, and brought back that same day in a truck to Chicago some 50 boxes containing the unclaimed contents of safe deposit boxes. An inventory prepared in Springfield at the time shows that the two

boxes from American National Bank, including specifically the contents of the Peters safe deposit box, were among the property transferred to the Chicago office.

The property from Springfield was placed in a private office of the Division in the area of the Chicago office of the Department on the fifth floor of a state office building. There were a number of private offices in the Department area. The Division had two of these and also an open work space in front of them for the staff of the Division. One of the Division private offices was occupied by Modrich and the other, containing a safe or vault, was not used full-time by anybody but was used from time to time by visiting supervisors of the Division from Springfield. This extra room had a lock and Modrich seems to have had the only key.

The contents of the Peters box and the other transferred property were put in the extra room on December 16, 1977. It is not made to appear whether the property was placed in the safe or vault or simply put in the room.

Beginning in early January 1978 and continuing for some eight to ten weeks thereafter, the Division made an inventory of the property brought from Springfield.

The inventory was made by five or six members of the Division staff; Modrich himself worked on the inventory occasionally. The work was done at a long table in the space in front of the two Division private offices. One or two boxes at a time were brought from the extra room to the table. At least two people would be at the table when work was going on. At lunch time and at the close of the day, all property being inventoried was supposed to be returned to the extra room which was supposed then to be locked. This must have generally been done as a matter

of routine. There was testimony, however, that on some occasions the property being inventoried was not returned to the extra room at the close of the day but was left overnight on the table in the open space.

The inventory work did not go on every day. The staff would sometimes go out of the office and do field work.

There were some thirty persons employed at the Chicago office of the Department. They all had access to the open space where the inventory work was done.

When the unclaimed property from American National Bank was reached for inventory, it was discovered that the contents of the Peters box A-934 was missing.

The only conclusion possible from the evidence is that the stock certificates and other contents of the Peters safe deposit box A-934 were stolen from the Chicago offices of the Department at some time after December 16, 1977.

Through the two Leader brothers, also named as defendants in Counts II, III, and IV, stock certificates stolen from the Peters safe deposit box were delivered for sale to a brokerage firm in Chicago (hereafter "the Rodman firm") and were sold by that firm. The Rodman firm sent by mail to transfer agents in three cities in New York the stock certificates described in Counts II, III, and IV. The transfer agents refused to make any transfers because a "stop" had been placed against the certificates.

As a result of an investigation then made, the matter was presented to a federal grand jury and the indictment was returned.

3.

The Government's position at trial was that Modrich stole the stock certificates from the Chicago office of the Department. The jury was asked on that basis to find appellant guilty and did so. The Government had presented its evidence; Modrich did not present any evidence.

After entry of a judgment of acquittal by the trial court, notwithstanding a guilty verdict, the standard for our review has been set out in *United States* v. *Blasco*, above cited, and repeated in *United States* v. *Beck*, 615 F.2d 441, 447-48 (7th Cir. 1980). On this appeal we are required to determine whether there is evidence from which the jury could reasonably find beyond a reasonable doubt that Modrich stole the stock certificates, viewing the evidence in the light most favorable to the Government. After considering the earnest and able argument for the Government, we conclude that the evidence is not sufficient to meet the standard for support of the verdict.

There is no direct evidence of a theft by Modrich nor any evidence, direct or circumstantial, that he knew or had any connection with either of the Leader brothers. The Government had neither evidence nor a speculative theory as to how the stock certificates got from Modrich to the Leaders, as they had to have done if Modrich stole them. It would serve no useful purpose to review in detail the circumstantial evidence which the Government contends is enough to justify a conclusion of theft by Modrich. We are in doubt that the evidence is much too weak to permit a finding beyond a reasonable doubt that Modrich stole the stock certificates. In this connection, we have assumed that evidence of two prior offenses (not convictions) by Modrich in 1976 and 1977 was properly admitted. We would have some question about the point were we required to decide it, because no issue of intent, motive, or the like, was involved. The issue was simply whether there was any act of taking. But we need express no opinion on the point since the evidence as a whole, even including the evidence of the earlier offenses, is not sufficient to support the verdict.

AFFIRMED.